Supreme Court, U.S.
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No. 04-1335 MAR 28 2005

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# In The
# Supreme Court of the United States

THOMAS GEIG,
*Petitioner,*

v.

CITY OF MACEDONIA, OHIO,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In Ohio, a mayor of a municipality, who is the Chief Executive Officer responsible for revenue production and the financial condition of the municipality, and who is also the Chief Law Enforcement Officer responsible for enforcement of federal, state and municipal laws, is granted the unfettered discretion under state law to establish a mayor's court and hand pick a magistrate to preside over such mayor's court. Fines imposed by the magistrate for violations of municipal ordinances are deposited into the municipality's general fund and the hand picked magistrate is responsible to the mayor, serves at the pleasure of the mayor and may be removed by the mayor at any time including during the time when a criminal trial is proceeding.

The Questions Presented are:

1. Whether a criminal defendant is denied Due Process of Law under the Fourteenth Amendment to the United States Constitution when the magistrate presiding over the mayor's court and adjudicating criminal cases has been hand picked by a party in interest to the case, which party has a pecuniary interest in the outcome of such case.

2. Whether a criminal defendant is denied Due Process of Law under the Fourteenth Amendment to the United States Constitution when the future compensation of the magistrate presiding over the mayor's court is entirely dependent upon the will of the appointing official who is constitutionally disqualified from presiding over such mayor's court.

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In the Supreme Court of the United States

No.

THOMAS GEIG, PETITIONER

v.

CITY OF MACEDONIA, OHIO, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

Thomas Geig respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-3a) dated October 20, 2004 is unpublished. The district court's memorandum of opinion and order granting defendants' motion to dismiss (Pet. App. 4a-34a) dated July 10, 2003 is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on October 20, 2004. The court of appeals denied the timely filed petition for rehearing and rehearing en banc on December 29, 2004. See Pet. App. 37a-38a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

This case involves an as applied challenge to Ohio Revised Code § 1905.05; the Attorney General of Ohio has been served with a copy of the Petition pursuant to U.S. Supreme Court Rule 29(4)(c). In addition, upon notice to the Clerk of the Court of Appeals by the Petitioner, the Clerk certified to the Attorney General of the State of Ohio that the constitutionality of a statute of Ohio was drawn in question as provided for by 28 U.S.C. § 2403(b).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law..."

Ohio Revised Code § 1905.05 is set forth in the appendix to this petition (Pet. App. 39a-42a).

## PREFACE

Next to the impropriety of being Judge in one's own cause, is the appointment of the judge.

2 Records of the Federal Convention of 1787, at 82 (Farrand rev. ed. 1937)(Remarks of Gouverneur Morris)

But in some of our state governments, judges are appointed for a term of years. In some, the appointments are made by the executive, in some by the legislative power. The mode of appointment is of little consequence as to the principle, if, when it has been made, the magistrate is independent of the further favour of the appointing power. The more important question is the condition and duration of the appointment. The condition of good behaviour necessarily accompanies all judicial appointments, for whatever term they may be granted. There are none during pleasure in this country...

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, Chapter XXX, at 277 (Nicklin 2d ed. 1829)

There are no *de minimis* violations of the Constitution- no constitutional harms so slight that the courts are obliged to ignore them.

*Elk Grove Unified School District v. Newdow*, 501 U.S. 1, 36-37 (2004)(O'Connor, J., concurring)

## INTRODUCTION

Although shockingly hard to believe, there still exists in the United States of America a judicial system in which a criminal defendant is subject to adjudication and sentencing before a magistrate who has been hand picked by the mayor of a municipality who is the Chief Executive Officer responsible for revenue production and law enforcement and which is the same municipality that has filed the criminal charges against

such defendant. This system is so brazenly rigged and biased toward convictions and resulting revenue for the municipality and an obvious evil because, in addition to the magistrate being hand picked by a mayor who is responsible for both balancing the budget and enforcing the laws, the mayor is empowered to remove the magistrate at any time including in the middle of a trial and the magistrate's future salary is directly and entirely dependent on the will of the mayor.

To rule for the defendant and find such defendant not guilty, the mayor's hand picked magistrate has to rule against the mayor's appointed law enforcement officer who has initiated the criminal proceeding by filing the criminal charges and against the mayor's appointed law director who has prosecuted the case. No magistrate who is beholden to the mayor for the payment of his or her future salary can be reasonably expected to rule for the defendant in each and every case where the defendant is entitled to be found not guilty; there is a functional *de facto* quota on findings of not guilty on any given day in a mayor's court as each finding of not guilty by the magistrate means the mayor receives no additional revenue for the city. To receive no additional revenue for the city is anathema for the mayor as Chief Executive Officer responsible for the financial condition of the municipality.

To have the Sword of Damocles as to future salary hanging over the head of the magistrate for every minute of the judicial proceedings is enough to create "a possible temptation"[1] by itself. Given the fact that the magistrate must also find against both the mayor's appointed law enforcement officer and mayor's appointed law director in order to find the defendant not guilty renders a fair and impartial adjudication impossible.

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1 "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."

*Tumey v. Ohio*, 273 U.S. 510, 532 (1927)

## STATEMENT

### A. Underlying Facts

This case arises out of a constitutional challenge to Ohio Revised Code § 1905.05 brought under 42 U.S.C. § 1983 by Petitioner, Thomas Geig, against Respondent, City of Macedonia, Ohio. In his Civil Rights Action, Petitioner Geig alleged a violation of his Constitutional Right to Due Process under the Fourteenth Amendment to the United States Constitution. Specifically relevant to the Petition, Petitioner Geig brought federal claims against Respondent alleging he was denied his right to Due Process of Law by being subjected to adjudication and sentencing in the City of Macedonia Mayor's Court before the magistrate of the mayor's court because such magistrate is appointed by the mayor of the municipality, who is a party in interest to the case with a financial interest in the outcome of the proceeding. In addition, Petitioner challenged the constitutionality of Ohio Revised Code § 1905.05, since such statute allows the mayor, a party in interest to the case in the mayor's court, to either retake the bench and preside over the mayor's court at any time or replace the magistrate at any time during the proceeding, including during the trial, resulting in the magistrate's tenure and future salary being entirely dependent on the will of the mayor.

On June 20, 2001, Petitioner Thomas Geig was driving a motor vehicle through the City of Macedonia, Ohio. After proceeding through an intersection within the City of Macedonia, Petitioner Geig was seized by Patrolman Bryan Vince, a law enforcement officer for the City of Macedonia. Patrolman Vince served Petitioner Geig with a criminal misdemeanor complaint and summons for allegedly violating a codified ordinance of the City of Macedonia in disobeying the instructions of a traffic control device. Specifically, Patrolman Vince alleged that Petitioner Geig "Disobeyed Traffic Device Rt. Turn Only." This allegation by Patrolman Vince was made despite the fact that Petitioner was in the lane marked for traffic

proceeding straight through the intersection, rather than turning, and Petitioner entered the intersection in this lane for traffic proceeding straight through the intersection. The monetary gain to the City of Macedonia's general fund from the misdemeanor complaint issued by Patrolman Vince to Petitioner Geig, if uncontested, was more than $100.00. The summons issued with the complaint by Patrolman Vince ordered Petitioner Geig to appear before the City of Macedonia Mayor's Court.

Adamantly disagreeing with the allegations made by Patrolman Vince, Petitioner Geig appeared before the City of Macedonia Mayor's Court on June 28, 2001. At the June 28, 2001 session of the City of Macedonia Mayor's Court, David Engle presided as Mayor's Court Magistrate. The Magistrate of the City of Macedonia Mayor's Court is hand picked by the Mayor of Macedonia under Ohio Revised Code § 1905.05, is responsible to the mayor and serves at the will of the mayor. The Mayor of the City of Macedonia is constitutionally disqualified from presiding over the Mayor's Court under *DePiero v. City of Macedonia*, 180 F. 3d 770 (6th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

Under Ohio Revised Code § 1905.05, a mayor's court magistrate is responsible to the mayor who appointed him or her and serves at the pleasure and convenience of the mayor and a mayor of a municipality may remove any magistrate at any time, including during the course of an adjudication in the mayor's court. For example, on March 31, 1998, in the Village of Northfield which borders the City of Macedonia, Mayor Carmen A. Consolo fired Mayor's Court Magistrate Sherri Bevan Walsh after she disagreed with Mayor Consolo's action in taking over a case and adjudicating a case that Walsh was waiting to hear and decide. Such case involved reduction of a charge from driving with a prohibited blood alcohol content of .186% to reckless operation for a defendant who was the son of a prominent businessman and who had retained a former Congressman to appear as his attorney. Upon the firing of Magistrate Sherri Bevan Walsh, Village of Northfield Mayor Consolo stated, "She has been a very good girl, but she believes

this court is her court. It's the mayor's court. She serves at my discretion." After firing Magistrate Sherri Bevan Walsh, Village of Northfield Mayor Consolo replaced Walsh with Magistrate Engle, who was the magistrate presiding over the City of Macedonia Mayor's Court. As Magistrate of the City of Macedonia Mayor's Court, Defendant Engle is responsible to the Mayor of the City of Macedonia and serves at the pleasure and convenience of the Mayor.

Petitioner Geig entered a plea of "not guilty" to the alleged misdemeanor offense on June 28, 2001, whereupon Magistrate David Engle accepted such plea as magistrate and set a July 12, 2001 date in the City of Macedonia Mayor's Court. At Petitioner Geig's trial on July 12, 2001 in the City of Macedonia Mayor's Court, Petitioner Geig appeared *pro se* and David Engle presided as Magistrate, appointed by the Mayor and employed by the municipality. Patrolman Vince appeared, employed by the municipality. The law director responsible for prosecuting the case, appeared, and was employed by the municipality. Except for Petitioner Geig, all other participants were employees of the municipality, a party in interest in the case. The patrolman, the law director and the magistrate presiding over the case are all appointees of the Mayor of the City of Macedonia.

At the conclusion of the case, Magistrate Engle stated he was finding Petitioner Geig guilty of the alleged right turn offense, even though Petitioner Geig was in the through lane of travel when he proceeded into the intersection. Upon Magistrate Engle announcing that he was finding Petitioner Geig guilty and imposing a fine of $60.00 and court costs of $70.00, Petitioner Geig immediately proceeded to the office of the Clerk of the Mayor's Court and stated that he was going to appeal the judgment and sentence of the Court as found and imposed by Magistrate Engle. The Clerk of the Court, Tammy Vince, wife of Patrolman Bryan Vince and also an appointee of the Mayor, asked Petitioner Geig why he was appealing. Petitioner Geig replied to Clerk of Court Tammy Vince that he desired to appeal the judgment and sentence of the court in his

case. Clerk Tammy Vince then inquired again of Petitioner Geig why he was appealing as she had already entered the judgment and sentence of the Court into the Mayor's Court computer system. Petitioner Geig then handed to Clerk of Court Vince the Notice of Appeal which was then filed with the Clerk of the Mayor's Court. Under Ohio law, the timely filing of a Notice of Appeal in a Mayor's Court vacates the judgment of a Mayor's Court and the proceedings before the Municipal or County Court having jurisdiction to hear the appeal are *de novo*. The Cuyahoga Falls Municipal Court hears cases appealed from the City of Macedonia.

On July 20, 2001, the Clerk of the Cuyahoga Falls Municipal Court received the court papers sent from the City of the Macedonia Mayor's Court and docketed the case with the Municipal Court. In municipal courts in Ohio, the Judges are elected by the citizens and are not beholden to either party to the cases or controversies before the court. Once the proceedings reached the Cuyahoga Falls Municipal Court, where the Mayor of the City of Macedonia has no influence or power and does not hand pick the judicial officer who will hear and decide the criminal charges, the situation and outcome changed drastically. On September 19, 2001, the Cuyahoga Falls Municipal Court dismissed the case with prejudice upon motion by the prosecution with court costs assessed against the City of Macedonia.

**B. Proceedings Below**

On February 26, 2003, Petitioner Thomas Geig filed a Civil Rights Action under 42 U.S.C. § 1983 against the City of Macedonia alleging that his adjudication and sentencing in the City of Macedonia Mayor's Court denied him Due Process of Law under the Fourteenth Amendment to the United States Constitution. In addition, Petitioner Geig made an as applied constitutional challenge to Ohio Revised Code § 1905.05, the statute which authorizes a mayor of a municipality to hand pick a magistrate for the mayor's court and which gives the mayor

the unfettered discretion to remove the magistrate at any time, including during an adjudication of a case.[2]

At the District Court level, Petitioner Geig first raised two federal constitutional claims in his complaint relevant to the Petition before this Court: 1) Denial of Due Process of Law by the Mayor of the City of Macedonia handpicking the magistrate to preside over the City of Macedonia Mayor's Court and hear and decide the criminal misdemeanor case against Petitioner Geig, since the Mayor is a party in interest to the case as the Mayor is the Chief Executive Officer responsible for the financial condition of the Municipality and Chief Law Enforcement Officer responsible for enforcement of federal, state and municipal laws and, additionally, is constitutionally disqualified under *DePiero v. City of Macedonia*, 180 F. 3d 770 (6th Cir. 1999) from presiding over the Mayor's Court (Count I); and 2) Denial of Due Process of Law and, as applied, Ohio Revised Code § 1905.05, when the future income of the magistrate presiding over the mayor's court is entirely dependent on the will of the authority who selected such magistrate where the employer was a party to the case (Count II).

On July 10, 2003, one day after the last dispositive pleading was filed, the District Court in a Memorandum of Opinion and Order granted Respondent's separate Motions to Dismiss under F.R.C.P. 12(b)(6).

In dismissing Count I of Petitioner Geig's complaint, the trial court found that Petitioner Geig's "reliance on *Chicago*

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2 Petitioner also named Patrolman Bryan Vince as a defendant seeking damages for violations of his Fourth Amendment right against unreasonable seizure from the traffic stop and initiation of criminal charges. While disagreeing with the District Court's rendition of the facts as to the traffic stop and resulting decision in its Memorandum of Opinion and Order, Petitioner has not made that alleged individualized constitutional violation part of this Petition. Instead, the entire focus is on the structural defect in the mayor's court system in Ohio with which he and more than 250,000 persons are subjected to each year as defendants.

*Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, ("Hudson"), 475 U.S. 292 (1986) is inapplicable to the instant case. *Hudson* did not involve a § 1983 violation or a due process violation***."[3]

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3 At the District Court level, Petitioner Geig cited this Court's decision of *Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986) to argue that if the selection of an arbitrator by a party to the case denied a litigant's constitutional right to an impartial decision maker, then *a fortiori* the selection of the magistrate by the prosecuting authority denied fundamental fairness required by the Due Process Clause to a criminal defendant. The District Court rejected Petitioner's "reliance on *Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, ("Hudson"), 475 U.S. 292 (1986)[as] inapplicable to the instant case. *Hudson* did not involve a § 1983 violation or a due process violation***". Pet. App. p. 18a.

However, a reading of this Court's decision in *Chicago Teachers Union Local No. 1, AFT, AFL-CIO, id.* indicates that this case did involve both § 1983 (though not a "violation", as such statute provides a remedy but not substantive rights) and an alleged due process violation and thus should have been a controlling precedent as clearly indicated by this Court, albeit in footnotes:

"Respondents relied on 42 U.S.C. § 1983 as a basis for their federal constitutional claims. *** Similarly, respondents mounted a facial attack on the Illinois statute as violative of the First Amendment and the Due Process Clause of the Fourteenth Amendment."

*Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson* 475 U.S. 292, 298, fn. 3 (1986)

"Respondents argue that this case should be considered through the prism of the procedural due process protections necessary for deprivations of property... We are convinced that, in this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property."

*Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 304, fn. 13 (1986)

In dismissing Count II of Petitioner Geig's complaint, the District Court held that there was never a "possible temptation" when the magistrate hearing a case is an attorney, since such attorney is bound by the disciplinary rules and judicial canons. This holding by the District Court that the "possible temptation" test, first made by this Court in *Tumey v. Ohio*, 273 U.S. 510 (1927), did not apply when the judicial officer was an attorney was unprecedented.

The U.S. Court of Appeals for the Sixth Circuit affirmed the District Court's dismissal on October 20, 2004. With great brevity, the Court of Appeals held, "We have reviewed the record and the parties' submissions, and, for substantially the same reasons set forth in the district court's order dated July 10, 2003, we AFFIRM the judgment dismissing Geig's complaint." Rehearing and rehearing en banc of a timely filed Motion by Petitioner was denied by the Court of Appeals on December 29, 2004.

## REASONS FOR GRANTING THE WRIT

### I. The Sixth Circuit decision in this case conflicts with the decision of another United States Court of Appeals and the court of last resort in three States.

The decision of the U.S. Court of Appeals for the Sixth Circuit affirming the District Court that no constitutional violation occurs when a party in interest to a case hand picks the judicial officer who adjudicates the case and which conditions the future salary or compensation of such judicial officer at the will of the appointing party in interest is directly contrary to the holding of the United States Court of Appeals for the Fifth Circuit in *Brown v. Vance*, 637 F. 2d 272 (1981). In *Brown v. Vance, supra*, the Fifth Circuit struck down the system used in Mississippi as denying due process where a party to the case not only hand picked which judicial officer would adjudicate the case, but left the judicial officer's future compensation at the will of such party in interest by granting unfettered discretion to

the law enforcement officer as to which justice of the peace would hear future cases and thus be compensated.

Similarly, in *Haas v. County of San Bernardino*, 45 P.3d 280, 27 Cal.4th 1017 (2002), the California Supreme Court held that a party to a case was denied due process where the selection of the judicial officer hearing and deciding the case was made by a party in interest to the case and conditioned the future compensation of such judicial officer to the will of the appointing official.

In *Pulaski County Municipal Court v. Scott*, 612 S. W. 2d 297 (Ark. 1981), the Arkansas Supreme Court invalidated a state statute on the ground that it denied a criminal defendant the constitutional right to a fair and impartial adjudication. In a 4-3 decision, with the narrowest of the concurring opinions being the controlling legal authority and opinion, Justice Dudley, joined by Justice Purtle, wrote:

> The county judge has executive responsibility for the financial affairs of the county. Municipal courts are substantial revenue producing courts. Clearly the county judge could not sit as a municipal court judge, for the reason stated in *Ward v. Monroeville**** Section 3(a) of the act in question gives to the county judge the power to appoint the municipal judge. The office of county judge in Arkansas is comparable to that of mayor in Ohio, as both are the chief financial officers of their respective governmental units. <u>If the county judge cannot sit as a judge on this type of court, he should not be given the power to decide who does sit. The impartiality of the county judge could be so diminished that he or she might not act in a disinterested fashion in selecting the person to serve in a judicial capacity. A maxim of common law is no one can do that indirectly which cannot be done directly.</u>
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> *Pulaski County Municipal Court v. Scott*, 612 S.W.2d 297, 301 (Ark.1981)(Dudley, J., concurring)(emphasis added)

The Louisiana Supreme Court has likewise held that the selection of the judge by a party in interest to a case violates a criminal defendant's constitutional right to due process. *State of Louisiana v. Simpson*, 551 So.2d 1303 (La. 1989)(holding that a system which allowed the prosecutor to "assign cases to the judge of his choice" was "facially unfair." *Simpson*, 551 So.2d at 1304.

**II. The Sixth Circuit decision in this case is contrary to the application of the "possible temptation" test for judicial disqualification from this Court in *Tumey v. Ohio*, 273 U.S. 510 (1927).**

The decision of the Sixth Circuit which affirmed the District Court opinion that the "possible temptation" test of *Tumey v. Ohio*, 273 U.S. 510 (1927) is inapplicable in judicial proceedings where the Judge or Magistrate is an attorney carved out an exception to *Tumey v. Ohio*, 273 U.S. 510 (1927) which is clearly contrary to this Court's pronouncements and application of the "possible temptation" test. In addition, Counsel for Petitioner's research, review and application of *Tumey v. Ohio*, 273 U.S. 510 (1927) and its "possible temptation" test finds no other court in the United States which has held that such "possible temptation" does not apply when the Judge or Magistrate in the judicial proceeding was an attorney. This best explains the complete absence of any case cited in the District Court's opinion which was affirmed by the Court of Appeals that has discussed such a scenario hypothetically, even in dicta, far less held likewise or even approached this Court's holding and rationale.

**III. This case would provide an opportunity for clarification of a criminal defendant's constitutional right to a fair and impartial adjudication.**

This case would clarify and answer the question of whether a criminal defendant's constitutional right to a fair and

impartial hearing is at a level at least equal to that in *Chicago Teachers Union Local 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986). In *Hudson*, this Court held that a procedure where one party to the litigation controlled the proceeding from start to finish (including the selection of the arbitrator, even though the decision of the arbitrator was final and not reviewable by the appointing Teachers Union) failed to provide an impartial decisionmaker and indicated that the same constitutional standard would apply if the case involved the Due Process Clause of the Fourteenth Amendment rather than the First Amendment.

> Respondents argue that this case should be considered through the prism of the procedural due process protections necessary for deprivation of property. As in *Abood*, we analyze the problem from the perspective of the First Amendment concerns. We are convinced that in this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property.
>
> *Chicago Teachers Union Local 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 304, fn. 13 (1986)

**IV. The Court of Appeals decided an important constitutional question that should be addressed by this Court.**

The decisions of this Court in *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972) have been the quintessential example of constitutionally unacceptable bias that denies a defendant due process of law. The current system being challenged which allows the mayor to handpick the magistrate and replace the magistrate at any time including during the middle of a criminal trial and subjects the magistrate's future salary entirely to the will of the mayor is no less objectionable. This system is fundamentally unfair and produces the most egregious denial of

due process resulting from a structural defect in the judicial system in the United States today with more than 250,000 persons each year subjected to this biased and rigged system as defendants.

This Court has recognized and held that Constitutional Rights are of little use if they can be denied indirectly through either sophisticated or simple minded systems and that the Constitution forbids the government from acting indirectly to achieve a constitutionally defective outcome that it is equally forbidden from achieving directly. See *Cooper v. Aaron*, 358 U.S. 1, 17 (1958); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995). The current system being challenged by Petitioner is an indirect attempt by the State of Ohio and Respondent to get around and defy *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972)[4] in a brazen way. While this Court has held that "In the absence of proof of financial interest on the part of the carriers, there is no basis for assuming a derivative bias among their hearing officers." *Schweiker v. McClure*, 456 U.S. 188, 197 (1982), here there exists proof of financial interest in this case with the mayor of the municipality, who is the Chief Executive Officer responsible for the financial condition of such municipality. Accordingly, a derivative bias exists with the magistrate hearing and deciding cases in the mayor's court when such magistrate is appointed by the mayor, answerable to the mayor and directly dependent on the will of the mayor for future income.

This Court has held that due process focuses on fairness between the State and the criminal defendant. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974); *Bearden v. Georgia*, 461 U.S. 660, 665 (1983). Whatever else that fundamental fairness requires, it is paramount that there be a minimal threshold of a Constitutional requirement where a criminal defendant is not

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4 "Petitioner is entitled to a neutral and detached judge in the first instance." *Ward v. Village of Monroeville, Ohio*, 409 U.S. at 61-62.

subject to adjudication and sentencing before a Court whose magistrate is under the control of the Executive.[5]

## CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Court of Appeals, affirming the District Court that no constitutional violation exists when a party in interest to a case with a financial interest in the outcome hand picks the magistrate for the adjudication and controls the future income of the magistrate, be reversed.

Respectfully submitted.

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5 But no one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the *structural* protection of tenure in office which has been provided in England since 1700. *** and is provided in all the States today.

*Weiss v. United States*, 510 U.S. 163, 198 (1994)(Scalia, J., concurring)

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
**File Name: 04a0033n.06**
**Filed: October 20, 2004**

**No. 03-4058**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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| **THOMAS GEIG,** | ) | |
| | ) | **ON APPEAL FROM** |
| *Plaintiff-Appellant,* | ) | **THE UNITED STATES** |
| | ) | **DISTRICT COURT FOR** |
| **v.** | ) | **THE NORTHERN** |
| | ) | **DISTRICT OF OHIO** |
| **CITY OF MACEDONIA,** | ) | |
| **OHIO; DAVID ENGLE,** | ) | **OPINION** |
| *in his official capacity as* | ) | |
| *Magistrate of the City of* | ) | |
| *Macedonia Mayor's Court;* | ) | |
| **BRYAN VINCE,** *in his* | ) | |
| *official* [sic] *as a Law* | ) | |
| *Enforcement Officer and* | ) | |
| *Patrolman for the City of* | ) | |
| *Macedonia, and in his* | ) | |
| *individual capacity,* **DON** | ) | |
| **KUCHTA,** *in his official* | ) | |
| *capacity as Mayor of* | ) | |
| *Macedonia* | | |

*Defendants-Appellees*

**BEFORE: MARTIN, COLE, and GIBBONS, Circuit Judges.**

**PER CURIAM.** Plaintiff-Appellant Thomas Geig appeals from the July 10, 2003 order of the district court granting Defendants-Appellees' motions pursuant to Fed. R. Civ. P. 12(b)(6) and dismissing his complaint, which alleged violations of Ohio Revised Code § 1905.05 and constitutional violations pursuant to 42 U.S.C. § 1983 stemming from his prosecution in a mayor's court for violating a municipal traffic law. In his complaint, Geig alleged that: (1) Defendant Kornuc[1], the Mayor of Macedonia, Ohio, is prohibited by the Due Process Clause of the Fourteenth Amendment from

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1 During the pendency of this appeal, former Macedonia Mayor Kornuc was succeeded by current Macedonia Mayor Don Kutchta, who was properly substituted as a party.

appointing any person as a magistrate; (2) Defendant Engle, a Magistrate of the City of Macedonia's Mayor's Court, was not a neutral and detached judicial officer; and (3) Defendant Vince, a law enforcement officer for the City of Macedonia, seized Geig without probable cause. Geig sought a permanent injunction enjoining Defendant Kornuc from appointing anyone to the position of magistrate, compensatory damages, punitive damages, and attorneys' fees.

We review a district court's dismissal of a claim pursuant to Fed. R. Civ. [sic] 12(b)(6) *de novo*. *Block v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998). We have reviewed the record and the parties' submissions, and, for substantially the same reasons set forth in the district court's order dated July 10, 2003, we **AFFIRM** the judgment dismissing Geig's complaint.

**FILED**
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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **THOMAS GEIG,** | ) | **CASE NO. 5:03 CV 358** |
| | ) | |
| **Plaintiff,** | ) | **JUDGE DAN AARON POLSTER** |
| | ) | |
| **vs.** | ) | |
| | ) | **MEMORANDUM OF** |
| **CITY OF MACEDONIA,** | ) | **OPINION AND ORDER** |
| ***et al.,*** | ) | |
| | ) | |
| **Defendants.** | ) | |

Before the Court are Defendants Mayor Barbara Kornuc, Magistrate David Engle, and the City of Macedonia's Motion to Dismiss Counts I and II, (**ECF No. 17**) and Defendant Officer Bryan Vince's Motion to Dismiss Counts III and IV (**ECF No. 20**). Plaintiff Thomas Geig ("Geig") filed Responses

in Opposition and Defendants filed Reply Briefs. Geig was cited by Defendant Officer Vince for disobeying Macedonia traffic laws by making a left lane change from a right turn only lane on June 20, 2001. Geig has sued Defendants Kornuc, Engle, Vince, and the City of Macedonia ("City") under 42 U.S.C. § 1983 and Ohio Revised Code § 1905.05 for violating his rights under the Fourth and Fourteenth Amendments of the United States Constitution. For the following reasons, the Court **GRANTS** Defendants' Motions to Dismiss.

## I. Facts

On June 20, 2001, Geig was operating a motor vehicle in an eastbound direction on State Route 82 approaching the intersection of Bedford Road. Geig was traveling in the curb lane, which changed into a right hand turn only lane. Instead of turning right, Geig sought to change lanes by moving one lane to the left. Geig activated his left turn signal, "established eye contact with the operator of the Mack truck and was able to

obtain a visual signal from such Mack truck operator for Plaintiff Geig to change lanes and pull in front of the Mack truck." *ECF No. 1, Complaint* ("Compl."), ¶ 21. Officer Vince, a patrolman for the City of Macedonia, was traveling in the opposite direction observed Geig, turned around, and activated his patrol car lights to signal for Geig to stop his vehicle. Officer Vince issued Geig a summons and a criminal complaint for violating the City of Macedonia's Codified Ordinance § 313.01, a traffic control device requiring a right turn only at the intersection of State Route 82 and Bedford Road. *Compl.* ¶¶ 31; 33; Exh. 1.

Geig appeared in the mayor's court and entered a plea of not guilty to the charge. The case was scheduled for trial. On July 12, 2001, Magistrate Engle found Geig guilty and imposed a fine of $60.00 and court costs of $70.00. Geig appealed the judgment to the Cuyahoga Falls Municipal Court and on September 19, 2001 the case was dismissed.

Geig's complaint alleges that Mayor Kornuc

("Defendant Kornuc") is forbidden by the Due Process Clause of the Fourteenth Amendment to appoint any person as magistrate, that Magistrate Engle ("Defendant Engle") was not a neutral and detached judicial officer, and that Officer Vince ("Defendant Vince") seized Geig without probable cause. Geig is seeking a permanent injunction enjoining Defendant Kornuc from appointing anyone to the position of magistrate, compensatory damages, punitive damages, and reasonable attorney's fees.

## II. Standard of Review

In considering a Rule 12(b)(6) motion to dismiss, the Court is limited to evaluating whether a plaintiff's complaint sets forth allegations sufficient to make out the elements of a cause of action. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-

46 (1957); *Lillard v. Shelby County Bd. of Educ.*, 76 F. 3d 716, 724 (6th Cir. 1996). The complaint must be construed in a light most favorable to the nonmoving party and its allegations taken as true. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). A complaint must contain either direct or inferential allegations with respect to all the material elements necessary to sustain a recovery under some viable legal theory. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988). Consequently, a complaint will not be dismissed under Rule 12(b)(6) unless no law supports the claim made, the facts alleged are insufficient to state a claim, or an insurmountable bar appears on the face of the complaint.

In support of their motion to dismiss, Defendants have attached an exhibit for the Court's review. As a general rule, matters outside pleadings cannot be considered in determining a motion to dismiss unless the motion is converted to one for summary judgment. *See Weiner v. Klais and Co., Inc.*, 108

F.3d 86, 88 (6th Cir. 1997). The Sixth Circuit considers "[d]ocuments that a defendant attaches to a motion to dismiss . . . as part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Id.* at 89 (citation omitted). A defendant may attach documents pertinent to the case, which the plaintiff failed to attach to the complaint. *Id.* If this were not so, a plaintiff with a deficient claim could survive a motion to dismiss merely by choosing not to attach documents to his complaint. *Id.*

## III. Law and Analysis

To prevail on a civil action under 42 U.S.C. § 1983, a plaintiff must plead and prove that the defendant, acting under the color of state law, deprived him of a right secured by the Constitution and laws of the United States. *Paul v. Davis*, 424 U.S. 693, 700 (1976); *Williams v. Bass*, 63 F.3d 483, 485 (6th Cir. 1995). Title 42 U.S.C. § 1983 provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

However, the doctrine of qualified immunity protects government officials performing discretionary functions from such actions insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Jackson v. Leighton*, 168 F.3d 903, 909 (6th Cir. 1999)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity protects public officials from the harsh burden of litigation; thus, the threshold immunity question should be addressed as early in the litigation as possible. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Saylor v. Board of Educ. of Harlan County, Ky.*, 118 F.3d 507, 512 (6th Cir. 1997). Before determining whether the right violated was

clearly established or examining the reasonableness of a defendant's conduct in relation thereto, the court should decide as a preliminary matter whether a violation of constitutional rights occurred at all. *Jackson*, 168 F.3d at 909 (citing *Siegert*, 500 U.S. at 232). If the court finds that no right was in fact involved, then the court need not inquire further into whether the defendant satisfies the remaining elements of the qualified immunity doctrine. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). While qualified immunity is an affirmative defense to be asserted by the defendant, the ultimate burden of proof is on the plaintiff to demonstrate that a defendant in not entitled to qualified immunity. *Gardenhire v. Schubert*, 205 F.3d 303, 310-11 (6th Cir. 2000). In this case, Geig alleges that Defendants Kornuc, Engle, and the City violated his Fourteenth Amendment right and Defendant Vince violated his Fourth Amendment right to be free from unlawful seizure.

**Due Process Clause of the Fourteenth Amendment**

Geig's claims against Defendants Kornuc, Engle, and

Vince in their official capacities must be construed as claims against the City of Macedonia. *Fox v. Van Oosterum*, 176 F.3d 342, 347-48 (6th Cir. 1999). A municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978)(emphasis added). In other words, municipal liability cannot be based on a respondeat superior theory. *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403 (1997); *Holloway v. Brush*, 220 F.3d 767, 773 (6th Cir. 2000). To prevail on a claim of city liability under § 1983, Geig must establish (1) that he was deprived of a constitutional right; (2) that the city had a "policy" or "custom"; and (3) that the policy was "the moving force" behind the constitutional violation. *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 1000 (6th Cir. 1994); *see also Monell*, 436 U.S. at 690-91.

**A. Count I**

Count I of Geig's complaint alleges that Defendant

Kornuc is constitutionally disqualified to sit as judge and therefore is forbidden by the Due Process Clause of the Fourteenth Amendment from appointing any person to sit as a magistrate. *Compl.* ¶ 72.

Mayors are authorized by Ohio statute to appoint a magistrate to preside over any prosecutions that may be tried in the mayor's court. Ohio Rev. Code Ann. § 1905.05 (West 2003). The relevant statute provides that

> A mayor of a municipal corporation that has a mayor's court may appoint a person as mayor's court magistrate to hear and determine prosecutions and criminal causes in the mayor's court that are within the jurisdiction of the mayor's court, as set forth in section 1905.01 of the Revised Code. No person shall be appointed as a mayor's court magistrate unless the person has been admitted to the practice of law in this state and, for a total of at least three years preceding the person's appointment or the commencement of the person's service as magistrate, has been engaged in the practice of law in this state or served as a judge of a court of record in any jurisdiction in the United States, or both.

Ohio Revised Code § 1905.05(A). As a basis for Geig's

challenge to the constitutionality of § 1905.05, he cites *DePiero v. City of Macedonia*, 180 F. 3d 770 (6th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) and *Chicago Teachers Union Local No. 1 , AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986).

Geig argues that the *DePiero* court found Ohio Revised Code § 1905.01 unconstitutional and that the Mayor of Macedonia's[1] broad executive authority deprives an individual of due process, therefore, § 1905.05 is also facially unconstitutional. The Court is unpersuaded by Geig's argument for the following reasons: 1) the *DePiero* court found § 1905.01 not facially unconstitutional and 2) the *DePiero* decision was based on the facts of that case which held the then-mayor of Macedonia could not preside as a judge in the mayor's court. *DePiero*, 180 F.3d at 777; 782.

In *DePiero*, the plaintiff was convicted of a traffic

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1 At the time of the *DePiero* plaintiff's convictions Mayor Migliorini presided over the trial. Mayor Migliorini is not party to this lawsuit.

misdemeanor and contempt charges in the mayor's court which was presided over by the then-mayor of Macedonia. 180 F.3d at 774-75. The plaintiff brought a § 1983 action alleging deprivation of due process and challenging the constitutionality of Ohio Revised Code § 1905.01 et seq. *Id.* at 775. Section 1905.01 authorizes mayors to preside over prosecutions for violations of a municipal ordinance and for certain parking and moving traffic violations. *See* Ohio Rev. Code § 1905.01(A). The Sixth Circuit, in holding that § 1905.01 was constitutional, was guided by the Supreme Court's decisions in *Ward v. Village* [sic] *Monroeville*[2], *Dugan v. State of Ohio*[3], and *Tumey*

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2 *Ward v. Village of Monroeville, Ohio* 409 U.S. 57, 60 (1972) (a mayor's executive responsibilities for finances may make him partisan to maintain the high level of contribution from the mayor's court).

3 *Dugan v. State of Ohio*, 277 U.S. 61, 65 (1928) (defendant was not denied due process of law where mayor received no fees and the mayor's salary did not depend on convictions).

*v. State of Ohio*[4] and the fact that the Supreme Court has declined to strike down the mayor's courts. *DePiero*, 180 F.3d at 777.

Additionally, the *DePiero* court held that the plaintiff tried in the mayor's court was denied due process "because the powers with which [the then-mayor of Macedonia] was vested necessarily put him in 'two practically and seriously inconsistent positions, one partisan and the other judicial.'" *Id.* at 782 (quoting *Ward*, 409 U.S. at 60). The court held the then-mayor lacked authority to preside over the mayor's court. *Id.* The instant case is sufficiently distinguishable from *DePiero*. Even if the current mayor, Defendant Kornuc, has the same authority as the then-mayor of Macedonia the key difference is that Defendant Kornuc did not preside over Geig's trial. Geig was tried by a magistrate and found to have violated a

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4 *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927) (Court held that a judge who has a "direct, personal, substantial pecuniary interest" in a criminal case deprives a defendant of due process of law).

Macedonia traffic law by making a left lane change from a right turn only lane.

Since the Sixth Circuit found the then-mayor of Macedonia lacked authority to preside over the mayor's court, Geig asserts that the then-mayor, or any subsequent mayor cannot appoint someone to sit as a magistrate. There is nothing in the *DePiero* decision that indicates that due process is violated by a mayor appointing a magistrate to preside over a mayor's court. In fact, the Sixth Circuit stated:

> We do not decide in this case whether plaintiff would have been deprived due process had his case been tried by the Mayor's Court Magistrate instead of Mayor Migliorini himself. It is worth noting, however, that mayor's court magistrates are less vulnerable to potential bias. Mayors court magistrates are appointed by the mayor, but exercise only judicial functions. *See* Ohio Rev. Code § 1905.05. Moreover, they possess some degree of insulation from the mayor's influence as their decisions are not subject to the appointing mayor's review or approval.

*Id.* at 782 n. 6.

Geig's reliance on *Chicago Teachers Union Local No.*

*1, AFT, AFL-CIO v. Hudson* ("Hudson"), 475 U.S. 292 (1986) is inapplicable to the instant case. *Hudson* did not involve a § 1983 violation or a due process violation but challenged the arbitration procedures in a collective bargain contract. 475 U.S. at 296-97. The Supreme Court held the union procedures those nonunion employees had to follow in order to object to a "fair share fee" failed to provide for a prompt decision by an impartial decisionmaker. *Id.* at 307. The Court noted that from start to finish the procedure was entirely controlled by the union, including the final step where the union-selected arbitrator reviewed the procedure. *Id.* at 296. Geig alleges "[f]rom start to finish, the entire procedure is controlled by an interested party to the litigation, the City of Macedonia, through its Mayor." *ECF No. 19* at 2. Defendant Kornuc started the procedure by appointing Defendant Engle as magistrate. Defendant Engle had a trial, heard Geig's arguments, and concluded that Geig was guilty. Geig does not allege that Defendant Kornuc or the City reviewed or approved Defendant

Engle's judicial decision. Geig notes his final step was to appeal the magistrate's decision to the Cuyahoga Falls Municipal Court.[5] *Compl.* at ¶ 58. Geig offers no explanation as to how Defendant Kornuc or the City controls the decisions of the Cuyahoga Falls Municipal Court.

The Court finds Ohio Revised Code § 1905.05 facially constitutional. Furthermore, Geig has not established a constitutional violation by the City and has not bothered articulating a City policy or custom that caused any perceived deprivation. *Monell*, 436 U.S. at 690-91. Accordingly, this § 1983 claim against The City of Macedonia is dismissed.

**B. Count II**

In Count II, Geig alleges that because the mayor may remove a magistrate at any time the appointed magistrate cannot

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5 The Court notes that a "[p]etitioner is entitled to a neutral and detached judge in the first instance" and not wait until a *de novo* review by a municipal court. *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 62 (1972).

be neutral and detached in carrying out his judicial duties.[6] *ECF No. 19*, Plaintiff's Response at 6. Geig further argues that Defendant Engle's lack of a guaranteed salary and tenure results in a magistrate not being neutral and detached in carrying out his judicial duties.

Geig correctly states that the test is whether the situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused. . . ." *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). However, the Supreme Court held that allegations of "bias and prejudice on [a] general basis . . . are insufficient to establish any constitutional violation." *Aetna Life Insurance Co. v.*

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6 Perhaps to bolster this argument, Geig provided the Court with an article entitled *Northfield Mayor Fires Magistrate* published by Akron Beacon Journal in 1998. *See ECF No. 1*, Exh. 3. This article does not pertain to Defendant Kornuc and mentions that Defendant Engle was hired as Northfield's new magistrate.

*Lavoie*, 475 U.S. 813, 821 (1986).

In *Aetna Life Insurance*, the Court held the Alabama Supreme Court Justice's "general hostility towards insurance companies" was not enough to support allegations of bias and prejudice. *Id.* The Court then analyzed specific factors that might constitute bias and prejudice. *Aetna Life Ins.*, 475 U.S. at 822. At the time the Justice cast the deciding vote and authored the Alabama Supreme Court's opinion, he had pending a similar personal lawsuit against Blue Cross. *Id.* The issues that the Justice decided where [sic] the same issues pending in his personal lawsuit against Blue Cross. *Id.* at 823. Soon after the opinion of the Alabama Supreme Court was announced, Blue Cross paid the Justice $30,000 to settle his suit. *Id.* at 824. The Court did not decide whether the Justice was really influenced, but only if the "procedure would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true." *Id.* at 825 (quoting *Ward*, 409 U.S. at 60). The Court held that the Justice's interest

was "direct, personal, substantial, [and] pecuniary" and "violated the appellant's due process rights." *Aetna Life Ins.*, 475 U.S. at 824 (quoting *Ward*, 409 U.S. at 60).

Defendant's [sic] have submitted a copy of the City of Macedonia's pay range schedule, Ordinance No. 97-2002. *ECF No. 17*, Exh. A. The guaranteed pay range for a magistrate is $60.00 to $64.00 per hour. *Id.* Defendant Engle's pay range is fixed by the Council of the City of Macedonia. There is no allegation that Defendant Engle receives a fee or an adjustment in his salary for convictions in cases tried in the mayor's court. Defendant Engle receives a salary in any event, regardless of the outcome of any particular case.

The cases in which a bias has been found to exist, in violation of due process, involve one of two situations: 1) "either the decisionmakers derived a 'direct, personal, substantial pecuniary interest' from a decision adverse to claimants," or 2) "the decisionmaker was engaged in both adjudicative and executive functions in violation of the

principle of separation of powers".[7] *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989)(citing *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693 (7th Cir. 1982) and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972)). Neither of these situations exist in the present case.

In support of the argument that "due process requires that the Magistrate be protected with sufficient tenure to insure independence from Executive influence" Geig cites *Palmore v. United States*, 411 U.S. 389 (1973) and *Utica Packing Co. v. Block*, 781 F.2d 71 (6th Cir. 1986). Geig's reference to this proposition has been taken out of context. The Supreme Court held that "Congress may provide for trying local criminal cases before judges who, in accordance with the District of Columbia Code, are not accorded life tenure and protection against reduction in salary . . . neither [the District of Columbia nor any

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7 There is no allegation that Defendant Engle was engaged in both "adjudicative and executive functions."

of the 50 states] has a federal constitutional right to be tried before judges with tenure and salary guarantees." *Palmore*, 411 U.S. at 390.

*Utica Packing Co. v. Block*, 781 F.2d 71, 72 (6th Cir. 1986), challenged the administrative procedure employed by the Secretary of the United States Department of Agriculture ("USDA"). The *Utica* defendant was convicted of bribing a meat inspector. *Utica Packing Co.*, 781 F.2d at 73. The case was remanded back to the administrative law judge ("ALJ") to give the ALJ the opportunity to consider the defendant's mitigating factors. *Id.* at 74. The ALJ ordered the complaint dismissed and the USDA "violently disagreed" with the ALJ decision. *Id.* Instead of filing a motion for reconsideration to the same ALJ, the Secretary of the USDA revoked the ALJ's authority and granted the Deputy Assistant Secretary the authority to hear the reconsideration. *Id.* The Deputy Assistant Secretary found that the defendant was no longer allowed to receive inspection services so long as he was associated with

the Utica plant. *Id.* The Secretary admitted that "[o]ne of the purposes of appointing a 'second Judicial Officer' was to improve the Department's [USDA] chances of winning a petition for reconsideration." *Id.* at 75. The Court stated that "[t]here is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer." *Id.* at 78.

The Sixth Circuit, in dicta, stated that "mayor's court magistrates are less vulnerable to potential bias . . . [and] they possess some degree of insulation form the mayor's influence as their decisions are not subject to the appointing mayor's review or approval." *DePiero*, 180 F.3d at 782 n.6. In the instant case, there is no allegation that Defendant Engle's decisions were reviewed or approved by Defendant Kornuc or that Defendant Kornuc replaced Defendant Engle in the middle of the proceeding with a magistrate who would guarantee a conviction. The Court will not assume that Defendant Engle,

who is bound by the Canons 3 and 7 of Code of Judicial Conduct and the Code of Professional Responsibility,[8] could possible be "tempted" based on general allegations.

Accordingly, these general allegations are insufficient to establish any constitutional violation. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986). Even if Geig could establish a constitutional violation by the City and he has not articulated a City policy or custom that caused any perceived deprivation. *Monell*, 436 U.S. at 690-91.

**C. Count III**

In Count III, Geig alleges that, in stopping his stopping his vehicle and submitting to authority in response to Defendant Vince activating his patrol car lights on the police car, Geig was

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8 DR 1-102 MISCONDUCT
(A) A lawyer shall not: (1) Violate a Disciplinary Rule or, as a judicial candidate as defined in Canon 7 of the Code of Judicial Conduct, the provisions of the Code of Judicial Conduct applicable to judicial candidates . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice.

seized without probable cause and the seizure violated the Fourth Amendment to the United States Constitution. *Compl.* ¶¶ 84-85. Geig has sued Defendant Vince in his individual and official capacities.[9]

The Fourth Amendment prohibits unreasonable seizures, and states that:

> [t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be

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9 As previously discussed, Geig's suit against Defendant Vince in his official capacity is really a suit against the City. However, in an individual capacity suit, Defendant Vince may assert qualified immunity as a defense. As the Supreme Court noted:

> Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law. . . . While the plaintiff in a personal-capacity suit need not establish a connection to governmental 'policy or custom,' officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.
> *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citations omitted).

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

It is clear from the pleadings that Geig cannot defeat Defendant Vince's claim of qualified immunity because he has not established any constitutional violation.

In order to prevail in a Section 1983 action, Geig must prove that some conduct by a person acting under color of state law deprived him of a right secured by the Constitution or other federal laws. *West v. Duncan*, 179 F. Supp.2d 794 (N.D. Ohio 2001)(citing *Foy v. City of Berea*, 58 F.3d 227, 229 (6th Cir. 1995)).

In *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), the Court held that stopping a vehicle and detaining the driver is a seizure under the Fourth Amendment even if the traffic stop is brief in duration. However, an officer may stop a vehicle if the officer has probable cause to believe that a traffic offense has

occurred, even if the offense is minor. *See Whren v. United States*, 517 U.S. 806, 810 (1996)(the temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures). The Supreme Court has stated,

> [a] motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may be given a citation, but that in the end he most likely will be allowed to continue on his way.

*Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). *See also Atwater v. City of Lago Vista*, 532 U.S. 318, 364 (2001)(O'Connor, J., dissenting opinion)("when there is probable cause to believe that a person has violated a minor traffic law . . . state interest in law enforcement will justify the relatively limited intrusion of a traffic stop"). The probable cause determination turns on "what the officer knew *at the time*

*he made the stop.*" *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993)(emphasis in original). Under *Ferguson*, the focus in a traffic stop is "whether this particular officer in fact had probable cause to believe that a traffic offense had occurred . . . ." *Id.* In *Whren*, the Court held that when a police officer makes a routine traffic stop, it does not matter what the officer's motive was, or whether an objectively reasonable officer would have acted differently, so long as the officer had probable cause to believe that a traffic violation had occurred. 517 U.S. at 812-13.

The present issue is whether the complaint, when construed in a light most favorable to Geig, states a claim that Defendant Vince's seizure of Geig was without probable cause. The City of Macedonia Ordinance § 313.01, entitled Obedience to Traffic Control Devices, provides that: "No pedestrian or driver of a vehicle shall disobey the instructions of any traffic control device placed in accordance with the provisions of this Traffic Code, unless at the time otherwise directed." Geig

acknowledges that he was operating his vehicle in an eastbound direction on State Route 82 approaching the intersection of Bedford. Road. *Compl.* ¶¶15-17. As he proceeded towards the intersection, Geig was in a lane requiring a right turn only at Bedford Road intersection. *Id.* ¶17. Because Geig did not want to make a right hand turn, he activated his left turn signal and changed lanes by moving into the left lane. *Id.* ¶19-20. As he changed lanes, Geig moved in front of a Mack truck occupying the lane to his left. *Id.* ¶21. Defendant Vince, a police officer, was traveling in the opposite direction and observed Geig's actions. *Id.* ¶23. Defendant Vince reversed direction and pulled Geig over to the side of the road. *Id.* ¶¶24-26. Defendant Vince issued a traffic citation and summons that read: "Disobeyed traffic advise [sic] rt. turn only . . . [y]ou did disobey the rt. turn only sign at the above location, cutting off another vehicle, almost causing an accident." *Compl.*, Exh. 1. Geig was detained a short period of time while Defendant Vince wrote the summons and complaint and then Geig was allowed

to continue on his way.

Geig correctly states that "[i]n the § 1983 context, the question of whether probable cause existed is left for the jury, unless there is only one reasonable determination possible." *Crockett v. Cumberland College*, 316 F.3d 571, 581 (6th Cir. 2003)(citing *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995)). However, based on the description of the incident in the Complaint and Geig's pleadings, the Court finds that Defendant Vince had probable cause to believe that Geig violated Ordinance § 313.01. "Probable cause" means just that; it does not mean proof of guilt beyond a reasonable doubt. From Defendant Vince's vantage point, Geig changed lanes in an unsafe manner. Geig acknowledges that he changed lanes suddenly, but contends that he made eye contact and obtained a visual signal from the operator of the Mack truck behind and to the left of him. Even if there was true, there is no way that Defendant Vince could have seen it. Accordingly, this brief stop, for an observed traffic violation, does not violate the

Fourth Amendment's prohibition against unreasonable seizures. *Whren*, 517 U.S. at 808-819.

**D. Count IV**

Finally, Count IV alleges that Defendant Vince issued a summons and complaint to Geig for violating § 313.01 of the Macedonia Codified Ordinances without probable cause. As previously discussed, Defendant Vince had probable cause to stop Geig. *Compl.* ¶¶88-89. The actions of Geig moving from a right turn only lane into an occupied left lane were observed by Defendant Vince. On the citation and summons Defendant Vince wrote what he had observed and that Geig's actions nearly caused an accident. Accordingly, Geig has failed to articulate a colorable claim against the individual Defendant Vince for violating a constitutional right under the Fourth and Fourteenth Amendments.

Based on the foregoing, Defendants' Motions to Dismiss, **ECF Nos. 17 and 20**, are **GRANTED**. This

Memorandum of Opinion and Order dismisses with prejudice all claims set forth in the Complaint.

**IT IS SO ORDERED.**

S/ Dan Aaron Polster
**Dan Aaron Polster**
**United States District Judge**

**FILED**
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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **THOMAS GEIG,** | ) | **CASE NO. 5:03 CV 358** |
| | ) | |
| **Plaintiff,** | ) | **Judge Dan Aaron Polster** |
| | ) | |
| **vs.** | ) | **JUDGMENT ENTRY** |
| | ) | |
| **CITY OF MACEDONIA,** | ) | |
| ***et al.,*** | ) | |
| | ) | |
| **Defendants.** | ) | |

For the reasons stated in the Memorandum of Opinion and Order filed contemporaneously with this Judgment Entry, and pursuant to Federal Rule of Civil Procedure 58, it is hereby ORDERED, ADJUDGED AND DECREED that the above-captioned case is hereby terminated and dismissed as final.

**IT IS SO ORDERED.**

S/ Dan Aaron Polster

**Dan Aaron Polster**
**United States District Judge**

No. 03-4058

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
|---|---|
| THOMAS GEIG, | ) FILED |
| | ) |
| Plaintiff-Appellant, | ) DEC 29 2004 |
| | ) |
| v. | ) LEONARD GREEN, |
| | ) Clerk |
| CITY OF MACEDONIA, ET AL., | ) |
| | ) |
| Defendants-Appellees | ) ORDER |

**BEFORE:** MARTIN, COLE and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

s/Leonard Green
Leonard Green, Clerk/n

## OHIO REVISED CODE § 1905.05.

**Appointment of a mayor's court magistrate.**

(A) A mayor of a municipal corporation that has a mayor's court may appoint a person as mayor's court magistrate to hear and determine prosecutions and criminal causes in the mayor's court that are within the jurisdiction of the mayor's court, as set forth in section 1905.01 of the Revised Code. No person shall be appointed as a mayor's court magistrate unless the person has been admitted to the practice of law in this state and, for a total of at least three years preceding the person's appointment or the commencement of the person's service as magistrate, has been engaged in the practice of law in this state or served as a judge of a court of record in any jurisdiction in the United States, or both.

A person appointed as a mayor's court magistrate under this division is entitled to hear and determine prosecutions and criminal causes in the mayor's court that are within the jurisdiction of the mayor's court, as set forth in section 1905.01

of the Revised Code. If a mayor is prohibited from hearing or determining a prosecution or cause that charges a person with a violation of section 4511.19 of the Revised Code or with a violation of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine due to the operation of division (C) of section 1905.03 of the Revised Code, or is prohibited from hearing or determining any other prosecution or cause due to the operation of division (C) of section 1905.031 [1905.03.1] of the Revised Code, the prohibition against the mayor hearing or determining the prosecution or cause does not affect and shall not be construed as affecting the jurisdiction or authority of a person appointed as a mayor's court magistrate under this division to hear and determine the prosecution or cause in accordance with this section. In hearing and determining such prosecutions and causes, the magistrate has the same powers, duties, and

authority as does a mayor who conducts a mayor's court to hear and determine prosecutions and causes in general, including, but not limited to, the power and authority to decide the prosecution or cause, enter judgment, and impose sentence; the powers, duties, and authority granted to mayors of mayor's courts by this chapter, in relation to the hearing and determination of prosecutions and causes in mayor's courts; and the powers, duties, and authority granted to mayors of mayor's courts by any other provision of the Revised Code, in relation to the hearing and determination of prosecutions and causes in mayor's courts. A judgment entered and a sentence imposed by a mayor's court magistrate do not have to be reviewed or approved by the mayor who appointed the magistrate, and have the same force and effect as if they had been entered or imposed by the mayor.

A person appointed as a mayor's court magistrate under this division is not entitled to hear or determine any prosecution or criminal cause other than prosecutions and causes that are

within the jurisdiction of the mayor's court, as set forth in section 1905.01 of the Revised Code.

A municipal corporation that a mayor's court magistrate serves shall pay the compensation for the services of the magistrate, which shall be either a fixed annual salary set by the legislative authority of the municipal corporation or a fixed annual amount or fees for services rendered set under a contract the magistrate and the municipal corporation enter into.

(B) the appointment of a person as a mayor's court magistrate under division (A) of this section does not preclude the mayor that appointed the magistrate, subject to the limitation contained in section 1905.03 and the limitation contained in 1905.031 [1905.03.1] of the Revised Code, from also hearing and determining prosecutions and criminal causes in the mayor's court that are within the jurisdiction of the mayor's court, as set forth in section 1905.01 of the Revised Code.

HISTORY: 143 v S 131 (Eff 7-25-90); 146 v H 670 (Eff 12-6-96); 147 v. S 201. Eff 12-21-98

Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

No. 04-1335

IN THE

# Supreme Court of the United States

THOMAS GEIG,

*Petitioner*,

*v.*

CITY OF MACEDONIA, OHIO,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Petitioner Thomas Geig was given a ticket for disobeying a City of Macedonia, Ohio, traffic law that prohibited a left-turn-lane change in a right-turn-only lane. He was found guilty of that offense in the Macedonia Mayor's Court. The mayor's court was presided over by a licensed attorney (magistrate) who is appointed by the city's mayor pursuant to Ohio Revised Code § 1905.05. Geig appealed the decision of the magistrate to the Cuyahoga Falls municipal court, where he is entitled to a *de novo* trial. The traffic violation charge was ultimately dismissed against Geig. Geig could have pled not guilty and requested a jury trial, or simply refused to waive his right to a jury trial, which would have resulted in an immediate transfer to the Cuyahoga Falls municipal court. Ohio Rev. Code §§ 1905.01, 2937.08.

Geig claimed that the magistrate's at-will employment status and the mayor's appointment of that magistrate *per se* violates the requirements of due process. The District Court disagreed. The Sixth Circuit issued a one-page, slip opinion adopting the District Court's rationale and affirmed the dismissal of Geig's complaint. Upon Geig's petition for rehearing *en banc*, not only did the original panel members review and reject rehearing, but not one of all of the active judges of the Sixth Circuit requested a vote on the suggestion of rehearing *en banc*.

The Petition raises the following issue that was fully considered and properly decided below:

1. Can an Ohio mayor appoint an attorney as a magistrate to preside over a mayor's court without violating a criminal defendant's guarantee of the right to due process under the Fourteenth Amendment when the magistrate has a fixed salary not dependent on whether he convicts or does not convict, has no responsibility for the financial interests of the City, and the mayor does not review or approve the decision?

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## STATEMENT OF FACTS

### a. Background

On June 20, 2001, Petitioner Thomas Geig was cited for disobeying Macedonia traffic laws by making a left-turn-lane change in a right-turn-only lane. Officer Bryan Vince issued a summons that ordered Geig to appear in the City of Macedonia Mayor's Court.

On June 28, 2001, Geig entered a plea of "not guilty" and Defendant Magistrate David Engle accepted the plea and set his trial for July 12, 2001. On July 12, Magistrate Engle presided over the case in which Geig represented himself *pro se* to contest the charges. After hearing the evidence from Officer Vince and Geig, Magistrate Engle found Geig guilty and imposed a fine of $60 and court costs of $70.

Geig appealed the Mayor's Court decision. Under Ohio law, the timely filing of a Notice of Appeal in Mayor's Court vacates the judgment of a Mayor's Court. Geig was entitled to and requested a *de novo* appeal in the Cuyahoga Falls municipal court. On July 20, 2001, the Cuyahoga Falls Municipal Court received the notice of appeal Geig filed with the Mayor's Court. On September 19, 2001, the City of Macedonia prosecutor requested that the Municipal Court dismiss the case against Geig.

Ohio mayors are authorized by statute to appoint a magistrate to preside over any prosecutions that may be tried in mayor's court. R.C. § 1905.05. The magistrate is vested with the same power as the mayor to decide prosecutions, enter judgment and impose sentences; the judgment and sentence are not subject to the appointing mayor's review or approval "and have the same force and effect as if they had been entered or imposed by the

mayor." R.C. § 1905.05(A). Magistrate Engle's decisions were not subject to the appointing mayor's review or approval. R.C. § 1905.05. Magistrate Engle's compensation is not dependent on whether he convicts or does not convict a criminal defendant in mayor's court. The guaranteed pay range for a magistrate is $60 to $64 per hour, as set by the legislative authority (i.e., the City Council). (*Id.*)

After the traffic case had been dismissed, Geig filed a Complaint against the City of Macedonia, Magistrate David Engle, Mayor Barbara Kornuc and others. The District Court granted Defendants' Motion to Dismiss in its entirety and the Sixth Circuit affirmed that decision. Geig now seeks review in this Court. The City of Macedonia is the only party defendant to this appeal.

**b. Clarification of the Record**

Geig improperly interjects into the record a newspaper article that was attached to his Complaint and incorporate that information into his statement of the facts to this Court. (*See* Pet. at 6-7, last partial paragraph and first partial paragraph, respectively.) That article was entitled *Northfield Mayor Fires Magistrate* that appeared in the *Akron Beacon Journal* in 1998. The article does not relate to the Macedonia mayor, who was a defendant in this case, and notes that magistrate Engle was hired as Northfield's magistrate. Pursuant to Sup. Ct. R. 15.2, Respondents object to the inclusion of this information as part of the competent record before this Court for review of a 12(b)(6) motion to dismiss.

Despite the attempts of Geig to convince this Court otherwise, there is neither a conflict among the courts of appeals nor a misapplication of the well-established "possible temptation"

test, articulated by this Court almost 75 years ago in *Tumey v. Ohio*, 273 U.S. 510 (1927). Further, any alleged violation is not the result of a custom, policy, or practice of the City of Macedonia, but, rather, is the result of compliance with Ohio Revised Code § 1905.05. This Court should deny this Petition.

## REASONS FOR DENYING THE PETITION

### 1. There is no conflict.

Geig struggles to generate a conflict where none exists. This Court has decided a trilogy of cases on Ohio's mayor's courts that provides ample guidance to the Sixth Circuit and the lower courts. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Dugan v. Ohio*, 277 U.S. 61 (1928); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). The Sixth Circuit is also well qualified to apply that law to the present case, as it has done so, and in other cases involving Ohio mayor's courts. *See, e.g.*, *DePiero v. City of Macedonia*, 180 F.3d 770 (6th Cir. 1999) (finding then-mayor DiPiero himself could not preside over the mayor's court). While devoid of direct or real conflict among courts, Geig primarily relies on state cases that are far a field – factually and legally – from the present dispute.

Geig cites to a Louisiana court that determined counsel cannot stipulate that the district attorney choose the judge to be assigned to a capital or felony case, but that it must be done on a random basis. *State v. Simpson*, 551 So.2d 1303 (La. 1989). Having nothing to do with mayors' courts or the direct application of the specific law here (i.e., the "possible temptation" test), the *Simpson* case provides no "compelling" reason to accept certiorari as contemplated by Sup. Ct. R. 10. Similarly uncompelling is Geig's argument that a California court's concern over the selection of temporary administrative hearing officers

on an *ad hoc* basis is akin to the situation at bar. *Haas v. County of San Bernardino*, 27 Cal.4th 1017 (Cal. 2002). Acknowledging that the issue it addressed was "limited in scope," the *Haas* court identified the problem as the lack of specific legal, ethical, or professional standards governing temporary hearing officers. *Id.* at 1036-37. In the present case, the magistrate pursuant to state statute is a permanent at-will employee who has a fixed salary and is governed by Ohio's legal, ethical and professional rules for attorneys and judges. Finally, in *Pulaski County Municipal Court v. Scott*, 612 S.W. 2d 297 (Ark. 1981), Geig cites to a decision that addressed the application of the Arkansas constitution and the issue of whether a judge with county-wide jurisdiction must be elected or could be appointed under that constitution. In *Scott*, the greater number of judges (i.e., three) found that the appointment of a judge by another judge was constitutionally permissible under the Arkansas constitution. Engaged in an admittedly "dangerous" practice, two other judges concluded they objected to the appointment of judges but had written the concurrence "without the benefit of briefs and arguments on the subject" and without the issues having been "fully developed in the traditional adversary manner." *Id.* at 123. Two separate judges never reached the issue at all. While the lower trial court in that case apparently found the practice of appointment invalid and the judges at the appellate level approving of the practice did not constitute a majority, the lower court's decision was affirmed. In sum, the Arkansas case fails to present a conflict between a high state court and the Sixth Circuit's decision in this case or a compelling reason to address the present issue regarding Ohio's mayor's courts.

Confronted with the fact that no square conflict exists in the state courts, Geig stretches the Fifth Circuit's decision in *Brown v. Vance*, 637 F.2d 272 (1981) to demonstrate a purported

conflict in the federal courts.[1] But, upon a cursory examination, the *Brown* case is easily distinguishable. Indeed, the *Brown* facts fit squarely within the classic prohibition that a judge who has a "direct, personal, substantial pecuniary interest" in a case deprives a defendant of due process of law, as this Court held in *Tumey, supra*. That is clearly not the issue here. In *Brown*, the Fifth Circuit determined whether a statutory fee system compensating lay "judges" is unconstitutional when the "judge's compensation depends on the number of cases filed in his court." The lay judges in *Brown* received $6 per criminal case and $8 per civil case. The record supported that creditors would file more frequently in courts of judges who tended to favor plaintiffs and the judges knew and understood this practice. The critical distinguishing feature of the *Brown* case is that the compensation of the lay judges was a "direct, personal, substantial pecuniary interest." The compensation of the magistrate in the present case is statutorily fixed and is not dependent on whether he convicts or does not convict a defendant. Further, and unlike the lay judges in the *Brown* case, the magistrate was and must be an attorney.

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1. Geig also cites to *Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), presumably to demonstrate a perceived conflict with the decision of this Court. That case dealt with the factually distinguishable situation of a challenge to an arbitration procedure in a collective bargaining contract. In *Hudson*, the Supreme Court found a litany of defects in a procedure that was *completely controlled* by the Union. The *Hudson* case addresses compulsory payments by non-union employees to unions where the funds are used in part to support political speech or action with which the non-union objectors disagree. The present case does not deal with arbitration, the selection of an arbitrator, or the First Amendment. Magistrate Engle's decisions are not subject to the appointing mayor's review or approval *See* R.C. § 1905.05. Mayor Kornuc cannot reasonably be said to completely control the mayor's court. The *Hudson* case poses no conflict.

**2. There is no "compelling" basis for revisiting the application of the "possible temptation" test in this case.**

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Geig's plea to this Court to revisit the "possible temptation" test articulated in *Tumey v. Ohio*, 273 U.S. 510, nearly 75 years ago provides no compelling ground warranting review by this Court.

The possible temptation test provides the framework for determining whether a decision maker is constitutionally disqualified. The test can be stated as follows: Whether the situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . ." *Tumey v. Ohio*, 273 U.S. 510, 532 (1972). The test remains unchanged for more than seven decades. There is no dispute that the district court applied the "possible temptation" test to the facts of this case. Geig – not surprisingly – would like this Court to apply the test in a way favorable to him, but surely this Court has more pressing business than to reconsider the application of a test that has been applied by countless courts – as well as the lower courts in present case.

The case of *Dugan v. Ohio* is the most analogous mayor's court case to this dispute. The *Dugan* case demonstrates that the power of a mayor to appoint a magistrate of the mayor's court does not deprive the plaintiff of due process of law, so long as the compensation of the judge is not dependent upon the conviction of any defendant. *Cf. Dugan v. Ohio*, 277 U.S. 61 (1928). In *Dugan*, the Supreme Court held that the mayor's relationship to city finances and financial policy was too remote to presume bias toward conviction in prosecutions before him

as a judge. The mayor in that case had judicial functions but only very limited executive authority. The city was governed by a commission of five members, including the mayor, which exercised all legislative powers. A city manager, together with the commission, exercised all executive powers. In the present case, similar to the mayor in *Dugan*, Magistrate Engle exercised only judicial authority and had *no* executive authority. Moreover, Magistrate Engle had *no* direct relationship to the city's finances or the city's financial policy.

The lower courts refused to make the assumption that Magistrate Engle could "possibly" be "tempted" on the theory that he would be swayed like the branches of a willow tree in a brisk wind because he was appointed, rather than elected to a guaranteed term. Geig assumes too much. Nothing in the trilogy of Supreme Court cases on mayor's courts (i.e., *Tumey*, *Ward*, *Dugan*) remotely indicates that the mayor's appointment of a magistrate would violate due process.

### 3. This case provides no significant constitutional question warranting review.

This Court has recognized that not "all questions of judicial qualification . . . involve constitutional validity . . . thus . . . remoteness of interest would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). "Most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948).

While Geig claims that an appointed attorney/magistrate presiding over a mayor's court is a "biased and rigged system" and that the appointment is an indirect attempt to "defy" *Tumey* and *Ward* in a "brazen way," the contention overstates the scope

of those decisions or even a reasonable interpretation of when judicial disqualification reaches a constitutional level. (Pet. at 15.) Geig goes too far in marrying the present case to the precedent found in *Ward* and *Tumey*. The *Tumey* Court held that a judge who has a "direct, personal, substantial pecuniary interest" in a criminal case deprives a defendant of due process of law. *Tumey*, *supra*, at 522. In *Ward*, the Court held that when a mayor has "wide executive powers," is the "chief conservator of the peace," and a "major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court," the mayor has an improper interest in the proceedings. *Ward*, *supra*, at 58. Cases in which bias has been found to exist, in violation of due process, involve one of those two situations. Geig in his Complaint does not allege either of the situations mentioned above that would establish an actionable claim for violation of due process. These situations are classic examples of what could constitute possible due process violations of criminal defendants. Neither of these situations is presented in this case. Magistrate Engle's compensation is the same whether he convicts or does not convict. Magistrate Engle exercised only judicial functions and had no responsibility for the financial needs of the City of Macedonia. The magistrate's decisions are not subject to the appointing mayor's review or approval. *See* R.C. § 1905.05. Finally, the magistrate's decision in the mayor's court is subject to an absolute right to appeal and the criminal defendant is entitled to a *de novo* trial on the matter. Magistrate Engle's presiding over the Macedonia Mayor's Court simply does not violate a criminal defendant's guarantee of right to due process under the Fourteenth Amendment.

The distance between the examples of "constitutionally unacceptable bias that deny a defendant due process of law" found in *Tumey* and in *Ward* and the facts of the present case is vast. In the context of a system in which this Court and the Sixth

Circuit "has **not** found any fatal defect in the overarching system that permits a mayor simultaneously to exercise some combination of executive and judicial functions," the appointment of an attorney/magistrate who is required to uphold ethical, professional, and legal responsibilities should not be presumed to be biased *per se* merely by appointment by the mayor. *See DePiero v. City of Macedonia*, 180 F.3d 770, 777 (6th Cir. 1999). In fact, the law is well established that the presumption is the exact opposite: "The law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820 (1986) *citing* 3 W. Blackstone, Commentaries *361.

## CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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